



OFFICE OF THE POLICE COMMISSIONER

ONE POLICE PLAZA • ROOM 1400

September 4, 2012

CHAN

Memorandum for: Deputy Commissioner, Trials

Re: **Police Officer Clint Olivo**
Tax Registry No. 942291
Military and Extended Leave Desk
Disciplinary Case No. 2011-4578

The above named member of the service appeared before Assistant Deputy Commissioner Robert W. Vinal on November 30, 2011 and was charged with the following:

DISCIPLINARY CASE NO. 2011-4578

1. Said Police Officer Clint Olivo, assigned to Military and Extended Leave Desk, on or about and between March 30, 2010 through March 30, 2011, did engage in conduct prejudicial to the order, efficiency or discipline of the Department in that said Officer wrongfully did ingest a steroid, Nandrolone, without police necessity or authority to do so. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5

PUBLIC CONTACT - PROHIBITED CONDUCT GENERAL REGULATIONS

2. Said Police Officer Clint Olivo, assigned to Military and Extended Leave Desk, on or about and between March 30, 2010 through March 30, 2011, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department in that said Officer wrongfully did possess a steroid, Nandrolone, without police necessity or authority to do so. *(As amended)*

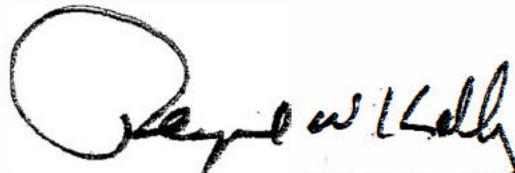
P.G. 203-10, Page 1, Paragraph 5

PUBLIC CONTACT - PROHIBITED CONDUCT GENERAL REGULATIONS

In a Memorandum dated June 27, 2012, Assistant Deputy Commissioner Robert W. Vinal found the Respondent Guilty of Specification Nos. 1 and 2 in Disciplinary Case No. 2011-4578. Having read the Memorandum and analyzed the facts of this matter, I approve the findings, but disapprove the penalty.

After careful analysis of this matter, I conclude that Respondent Olivo's violation of Department policy was egregious and warrants separation from the Department. It is therefore directed that Respondent Olivo be offered a post-trial Negotiated penalty, which includes immediately filing for Vested-Interest Retirement, the forfeiture of 30 suspension days (to be served), the forfeiture of all time and leave balances, including all time previously served while on suspension and suspension with pay, and that he be placed on One-Year Dismissal Probation (Respondent Olivo is to remain, and to separate from the Department, on a continued suspended duty status).

Such Vested-Interest Retirement shall also include Respondent Olivo's written agreement to not initiate administrative applications or judicial proceedings against the New York City Police Department to seek reinstatement or return to the Department. If Respondent Olivo does not agree to the terms of this Vested-Interest Retirement as noted, this office is to be notified without delay. This agreement is to be implemented **IMMEDIATELY.**



Raymond W. Kelly
Police Commissioner



POLICE DEPARTMENT

The
City
of
New York

June 27, 2012

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Clint Olivo
Tax Registry No. 942291
Military and Extended Leave Desk
Disciplinary Case No. 2011-4578

The above-named member of the Department appeared before me on November 30, 2011, December 21, 2011 and January 31, 2012, charged with the following:

1. Said Police Officer Clint Olivo, assigned to Military and Extended Leave Desk, on or about and between March 30, 2010 through March 30, 2011, did engage in conduct prejudicial to the order, efficiency or discipline of the Department in that said Officer wrongfully did ingest a steroid, Nandrolone, without police necessity or authority to do so. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5 PUBLIC CONTACT - PROHIBITED CONDUCT GENERAL REGULATIONS

2 Said Police Officer Clint Olivo, assigned to Military and Extended Leave Desk, on or about and between March 30, 2010 through March 30, 2011, did engage in conduct prejudicial to the order, efficiency or discipline of the Department in that said Officer wrongfully did possess a steroid, Nandrolone, without police necessity or authority to do so. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT - PROHIBITED CONDUCT GENERAL REGULATIONS

The Department was represented by Mark Berger, Esq., Department Advocate's Office, and Respondent was represented by Craig Hayes, Esq.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent is found Guilty.

SUMMARY OF EVIDENCE PRESENTED

Introduction

The parties stipulated that the following documents be entered into evidence: Department's Exhibit (DX) 1 is a Drug Screening Questionnaire - Hair Testing form completed by Respondent on March 30, 2011; DX 2 is a Drug Screening Questionnaire form for urine screening completed by Respondent on March 30, 2011; DX 3 is a Forensic Drug Testing Custody and Control Form completed by Respondent on March 30, 2011; DX 4 is a Quest Diagnostics Drug Detail Report dated March 30, 2011.

The Department's Case

The Department called Police Officer Frank Arayead, Sergeant James Weck, and Dr. Barry Sample as witnesses.

Police Officer Frank Arayead

Arayead, a 25-year Member of the Service (MOS), was assigned to the Medical Division for 10 years. During March, 2011, he worked in the Drug Screening Unit where

his duties included collecting specimens of urine and hair from MOS for drug testing.

Arayeads received training from the Psychomedics Corporation and Quest Diagnostics (Quest). He is also a trained Emergency Medical Technician.

Arayeads testified that on March 30, 2011, Respondent reported as ordered to the Drug Screening Unit for a random drug screening. Respondent filled out DX 2 and was fingerprinted. Respondent was assigned a drug screening number of 22-1333-11-X. On DX 2 Respondent did not indicate that he had taken any medications. After Respondent completed the Drug Screening Questionnaires, Respondent also filled out the Forensic Drug Testing Custody and Control Form (DX 3).

Arayeads testified that whenever a MOS reports to the Drug Screening Unit for random drug screening for urine, he follows the same procedure every time regarding collecting the MOS's urine sample.

To collect an officer's urine sample, Arayeads accompanies the officer to the bathroom where he opens a brand new urine collection kit. Inside the kit is a beaker which contains two test tubes and a plastic security envelope. Arayeads opens it in front of the officer and hands him the beaker and instructs him to fill the beaker halfway. After the beaker is filled halfway with urine, the officer is allowed to finish up. Arayeads then opens a test tube in front of the officer and instructs him to fill the tube to 30 milliliters. After the officer fills the test tube, the officer closes and snaps the lock and places it on the blue table in front of Arayeads. The officer then repeats this same procedure and submits a second urine sample.

Arayeads said he had a "vague memory" of Respondent. Arayeads collects approximately seven hair and seven urine samples daily. He said, "This is the normal

process. Very rarely is it different unless it is something that stands out.” He agreed that there was nothing unusual that stood out about Respondent’s case. Had something unusual about Respondent’s sample collection occurred, Arayeas would not necessarily have documented it, but he would have remembered it more.

Continuing with his explanation of the procedure, Arayeas said that after the urine samples are placed in two separate vials, he places the seals, which were previously filled out by the officer, over the test tubes and then instructs the officer to completely wrap the seal over the two test tubes and place the tubes into the plastic security envelope. Arayeas holds the plastic security envelope open as the officer places the tubes in it, and then Arayeas seals the plastic security envelope in front of the officer. The envelope is then placed into a locked refrigerator.

After the urine sample is stored in the refrigerator, Arayeas continues to the second part of the test, the hair collection. After the hair collection is completed, the officer is excused. The urine samples are then packed up and moved to a temporary storage facility, a locked refrigerator located next door, under the supervision of the desk officer. The hair sample gets boxed and placed into a separate steel cabinet which is then locked. The urine test is sent to Quest Diagnostics. Arayeas did not recall Respondent raising any issues during the collection process.

During cross-examination, Arayeas said that that during the hair collection procedure, two officers can be accommodated because there are two tables in the room. But, “On the urine testing, usually it’s one person, but if they are doing some testing in the back, sometimes there could be other people in there also.”

When collecting urine samples, Arayeas escorts the officer to the bathroom and stands adjacent to the stall or partition and faces the officer's back as the officer urinates into the beaker. While the officer is producing a sample, Arayeas can see the officer's "full back, of course, and sometimes you could [see] some of the front because there is like a little bit of specimen mirror there and sometimes you see a little movement and sometimes not, depending where the person places it and how he places it."

Arayeas said that once the caps on the tubes are sealed, it could take approximately one or two minutes to seal the security envelope. When asked if this is the procedure that he has followed the past ten years, Arayeas replied, "On this situation -- there are things that happen, did he do the urine or sometime you do a hair first so it is different situations." Continuing his narrative, Arayeas said, "if you do a urine first, that's fine. If you do hair first then that's different."

With regard to the temperature of the urine as noted on the Forensic Drug Testing Custody and Control Form, Arayeas explained that he can read the temperature strip or feel the warmth of the sample in his hand. If the beaker feels cool, then he would pay more attention to the beaker and determine if the temperature is registering or not. Although he did not describe this step in his explanation of the collection procedure, he said, "I do it automatically. I look at it and that's it. Sometimes if I have to do -- if I feel that the thing is warm and I am walking with him -- what that does is that re-confirms that the specimen comes from him." He acknowledged that the specimen should be between 90 and 100 degrees and that he can tell by touching the specimen that it is warm enough to be in that temperature range. Arayeas, while wearing gloves, physically holds the specimen, after the specimen has been sealed by the officer and placed in a plastic

bag [security envelope]. He acknowledged that he was not trained to feel the warmth of the samples.

Arayeas explained that since agencies other than the Department do not personally observe the person urinating in the beaker, those agencies use the temperature strip on the back of the beaker to determine that the specimen came from that person. There are no temperature strips on the test tubes. There are different dots on the temperature strip and when there is warm liquid in the beakers, the dots begin to change color [from black to blue or a darker color]. Arayeas said reading the temperature strip is not part of his procedure because he stands next to the officer and personally observes him urinate into the beaker.

Arayeas agreed that there are times when he cannot see the officer's penis while the officer is urinating into the beaker, but explained that he looks to see if the officer is placing the beaker near that part of his body. Arayeas can also hear the beaker filling up. If Arayeas becomes suspicious, then he would "go like right up behind him and then take a -- you physically look for that." He said that a personal observation is made to ensure that the test is done correctly. He acknowledged that if someone used a prosthetic or plastic bottle, then the test would not be done correctly and that he does not insist on seeing the officer actually urinate every single time because the officer is given very little notice about the test, and does not have time to prepare any type of apparatus. He said that officers are called up [on the day of the test] and instructed to come in. He also said that in the past, when officers were given more than 24 hours notice, an apparatus or plastic container was more common.

When he was asked why he did not have to actually witness the urine leaving the penis, Arayeas replied, "You can always see it; different body sizes, different body types. If a person is very large, you are not going to be able to see it. He can't see his own penis if he is large." Arayeas said there are mirrors there and he can use them if he needs to. He acknowledged that there were no other positive tests on that day. He said the temperature of the specimen is always changing. Arayeas is not aware of any thermometers within the facility.

On redirect examination, Arayeas agreed that the reason the urine must be between 90 and 100 degrees is to prevent a person from giving fraudulent urine samples.

Sergeant James Weck

Weck, a 19-year MOS, was assigned to the Internal Affairs Bureau (IAB), Group 21, during 2011. He testified that on April 23, 2011, he was assigned to investigate Respondent's drug test failure due to steroid use. Before interviewing Respondent, Weck conducted a background check on Respondent using Department records and he also researched the steroid nandrolone.

Weck testified that at Respondent's official Department interview on May 26, 2011, Respondent initially did not offer any explanation as to how he had tested positive for nandrolone. However, after a short break, during which he consulted with his counsel, Respondent admitted that he was injected with a substance by a friend in late summer, August or September, of 2010.

Weck recalled that Respondent told him that he took an injection from his friend, later identified as Person A because he had injured his back and had mentioned the

back injury to Person A who is a personal trainer. Person A then told Respondent that he had used something that would help Respondent to overcome the injury quicker and get him back in the gym so that he could resume his regular work out regimen. Respondent did not indicate if he had a prescription for the substance he was injected with, nor did he know what substance he was injected with.

After Respondent's interview, Weck reviewed Respondent's Personnel Employee Profile report and noticed that the Respondent was not on sick report during the time frame provided by Respondent.

Weck next tried contacting Person A to verify the explanation that Respondent had provided but, after getting Person A voicemail over a dozen times, Weck asked Respondent to contact Person A and have him return Weck's phone calls.

Weck spoke with Person A on June 20, 2011 (DX 5 is the transcript of the June 20, 2011). During this interview, Person A said that when Respondent told him that he was having issues with a back injury, Person A offered Respondent "deca," which Person A had used himself for joint problems, and suggested that "deca" would help Respondent with his injury. Person A did not recall telling Respondent that "deca" was illegal. Weck later learned that "deca" was the street name for nandrolone. Weck was then directed by his commanding officer to confer with the Bronx District Attorney's Office regarding a possible criminal action against Person A the result of which is still pending.

On cross-examination, Weck agreed that Person A did not assert that he had told Respondent that "deca" could build his muscles or make him stronger. Weck also agreed that there was no evidence that indicated that Person A gave Respondent more than one shot nor was there any evidence that indicated that Person A was a drug dealer. Weck

acknowledged that there was nothing in Respondent's history to indicate that he had a problem with violence or anger, nor was Weck aware of Respondent being on force monitoring for repeatedly using excessive force. Based on his research, Weck learned that "deca" is "performance enhancing" and "it comes as an injection it's not a pill it's an injection only." Weck did not research if "deca" was capable of making a person bigger and stronger, nor was he aware of any side effects or potential side effects of "deca." Weck did not recall if Respondent had any serious health problems.

Dr. Barry Sample

Sample is employed as the Director of Science and Technology, Employer Solutions, at Quest. Sample is also a New York State licensed lab director for testing. Sample has published papers on drug testing, including steroids. Prior to working for Quest, Sample was the Director of Forensic Toxicology at SmithKline Beecham Clinical Laboratories, where he was responsible for the "day-to-day operations for forensic drug testing, which included workplace drug testing, athletic drug testing for anabolic steroids and other performance enhancing drugs, medical professional tests, which would test for a wider variety of drugs that medical professionals may have access to." Sample was also employed at the Sports Medicine Identification Drug Laboratory, an IOC (International Olympic Committee) accredited laboratory, as the Assistant Director and was responsible for the day-to-day operations the laboratory performed, the clinical and forensic toxicology workplace drug testing, and sports drug testing. In 2011, he received a quality award from his business in employer solutions and he an innovation award from the Nichols Institute due to his efforts in filing some patent applications.

As the Director of Science and Technology at Quest, Sample is responsible for the introduction of new products and services through new tests, informatics and test development. He is also responsible for the "forensic toxicology operation in our Lenexa, Kansas laboratory as a New York State licensed director for those operations and also the College of American Pathologists Forensic Drug Tests [CAP-FDT] Accreditation Program, Scientific Program Director for that laboratory."

He explained that Quest performs drug testing on urine samples and the samples are certified by the laboratory certifying scientists. Sample, as the CAP-FDT Scientific Director and as the New York State licensed director for forensic toxicology, is responsible for all the technical and administrative aspects of the laboratory, including the performance of laboratory certifying scientists.

Sample explained that forensic toxicology urine testing means that the "results of those tests have forensic i.e. legal or employment evaluative implications based on the results and tests that were performed." Sample has also personally conducted tests on urine samples to detect steroid use. He agreed that during his career, he has either conducted or overseen millions of drug tests. Sample has testified in different courts of different jurisdictions as an expert in the field of forensic toxicology on urine testing, possibly five times. Several years ago, Sample testified in a Los Angeles Police Department employment case relating to a steroid-positive police officer.

Based on Sample's testimony and curriculum vitae (DX 6), Sample was deemed an expert in the field of forensic toxicology and urine testing for drugs.

He said that Quest has been performing urine tests for more than 20 years and has conducted more than 100,000 tests for anabolic steroids. Sample explained that steroids

are typically ingested or injected, and that after steroids enter the body, as a foreign substance, the body's goal is to "eliminate those substances from the body so in order to enhance elimination and/or detoxify from the body it would perhaps metabolize them in any event either the parent compound or the metabolite may end up in the urine as a mechanism for eliminating that or that drug metabolite from the body."

Sample testified that in the United States, nandrolone is only available as a legitimate pharmaceutical product, administered by an injection and that there is no oral form of nandrolone legally available. Furthermore, nandrolone is a controlled substance which requires a prescription and can only be administered by a licensed physician or someone under the physician's direction.

To test urine samples for nandrolone and its metabolites, Quest uses electron impacted gas chromatography mass spectrometry (GC/MS) that is operated in the selected ion monitoring mode. He said that a metabolite is a metabolic by-product of a substance that the body creates in order to either reduce toxicity or enhance its elimination from the body. There are two major metabolites for nandrolone; 19-norandrosterone and 19-noretiocholanolone. Quest looks for both of these metabolites while testing for nandrolone. However, Sample said that, "consistent with international standards of testing for nandrolone metabolites in urine it only takes the presence of 19-norandrostone at or about the administrative cut off to be reported as a non negative or positive drug test." The limit of detection is the lowest concentration that can be definitively identified in a specimen.

Sample described the threshold or the cut-off level as "administrative or program defined level or concentration below which a specimen would be considered negative."

The cut-off level for 19-norandrosterone, consistent with international standards, is two nanograms per milliliter. A urine sample test at or above the cut-off level will not conclusively tell you that the donor had used nandrolone because it would have to depend on whether the injection is an oil-based or water-based, on the dose administered and the frequency of injection. All of these factors can impact the "window of detection." He said that a single dose of oil-based nandrolone, when taken by an injection, is detectable up to, "several months, two months or so whereas following repeated injections the way athletes have used these substances injecting multiple times at high doses over an 8, 10, 12 week period of time, we've seen positives for a year or more after discontinuation of use."

He explained that a laboratory data or documentation package summarizes all the relevant chain of custody and analytical data that the laboratory relied on to report the result on a given specimen. He said that the chain of custody is critically important because one can essentially conclusively link the donor with the test result.

Upon receipt of the specimen by the laboratory, the sealed and packaged specimen goes through a sortation process where the purpose of test is determined. The sealed specimen is then taken to a station where the package is opened, inspected and logged in laboratory computers.

Sample said that the Quest Diagnostics Drug Detail Report for Respondent's random (urine) drug test (DX 4) indicated that the specimen was positive for nandrolone metabolite. With regard to the corresponding Documentation Package (DX 7), Sample agreed that the chain of custody was intact with regard to the specimen at issue. Sample also agreed that DX 7 did not indicate gender, race or any other identifying factor about

the individual who provided the urine sample. The specimen is tracked using a laboratory accession number, which is generated after the specimen has been logged into the laboratory information systems. The accession number for this specimen was 972478T. He said the specimen was collected on March 30, 2011 and received by the laboratory on April 1, 2011.

The concentration of 19-norandrosterone in the specimen associated with accession number 972478T was 6.8 nanograms per milliliter. He said that this "indicates that nandrolone metabolite was definitively identified at the concentration 6.8 nanograms per mill, which is greater than the cut off 2 nanograms per mil." He said that if the confirmatory test does not reach the cut-off level, then it is reported as negative. If the first specimen comes back with negative results, then Quest does not test the second specimen.

Regarding the Documentation Package for the second specimen (DX 8), assigned accession number 037486U, Sample agreed that the chain of custody was intact, and the donor is not identifiable. For the second specimen, the concentration of 19-norandrosterone was 6.8 nanograms per milliliter. He said that the results of the second specimen confirms the original results of the first specimen and, "in fact, the way our reporting protocols work in our agreement for testing with the NYPD it takes both the [first] and [second] sample to be positive before we make any laboratory report to the NYPD." If the first specimen screened and then confirmed positive, but the second specimen either screened or confirmed negative, then a negative result is notified to the Department.

On cross-examination, Sample stated that anabolic steroids are substances that are used to have an anabolic affect or create muscle, and the only approved medical use of

nandrolone is in the treatment of certain anemias to help the body create red blood cells. Sample further stated that athletes misuse anabolic steroids because they want to have an anabolic affect for muscle building, to have an anticatabolic affect, which stops the muscle from breaking down if the athlete is training very hard. It also decreases the recovery time between workouts.

When asked if anabolic steroids may be used to assist with overcoming an injury or rehabilitation, Sample replied that, "they have used that to that affect although that perhaps that use is probably not as well documented, there is probably a whole host of other reasons. People use anabolic steroids for body sculpting too."

Sample agreed that if someone uses steroids for enhancing performance, then he may start taking it in cycles, meaning that he may take a certain amount of the drug on intervals for a four, five or six-week period. This would entail taking an injection once or twice a day for that period. He agreed that when steroids are used by athletes or amateurs, this indicates that they may be affective in building up muscle and having an anticatabolic affect. If the steroids had worked for these individuals, they may not entirely take the cyclical dosage described previously because there may be some evidence for "anticatabolic affect it may not take as large a dose, it may not take that heavy dosing." He agreed that for the purposes of muscle building, one steroid injection would most likely not do much to the body.

Sample said that if the steroid is administered by injection, it would typically be intramuscular injections and in "depo form" and are in the muscle tissue and slowly released over time.

Some side effects of injecting steroids include a variety of "endorcin effects" that interfere with the production of naturally occurring steroids. There could also be cardiac side effects such as an increase in the low-density lipoprotein (LDL) or "bad cholesterol," and a decrease in the high-density lipoprotein (HDL) or "good cholesterol." Additional side effects have been associated with liver disease, blood filled system in the liver, and tendon rupture.

Sample said that an abuse or misuse of anabolic steroids would be the use of that outside the care of a prescribing physician. Sample could not determine with scientific certainty how much of the drug the subject had to ingest to reach 6.8 nanogram per milliliter. He agreed that a single nandrolone injection could have a window of detection for "two months or so," and that a larger dose would yield a longer window of detection. He also agreed that Respondent's positive results could have been caused by a single injection and that single injection could have occurred at least two months or more prior to March 30, 2011.

Sample said that the Drug Detail Report [Respondent's Exhibit (RX) A] reflects the results of laboratory analysis for anabolic steroids performed by Quest on a specimen collected from Respondent on April 20, 2011. Sample said that RX A shows that the specimen was negative for both anabolic agents and masking agents. He said a masking agent is a substance that an individual may take in order to mask the presence of anabolic steroids.

Sample said that based on the review of the analytical data contained in the corresponding Documentation Package (RX B), the laboratory certifying scientists did not feel that the specimen or RX A, warranted any confirmatory testing. He added that

because a confirmatory analysis was not done, he could not definitively say whether or not there was the presence of nandrolone, but based on his review of the data in the laboratory package, there might have been an indication that there was a very low level or a low level of the 19-norandrosterone metabolite in the specimen.

Referring to RX B, Sample said that the results suggest that there might be a small amount of nandrolone metabolite there but it is not quantified because the screening tests are done by pattern recognition. One would look at the data to see if it might be "presumptively positive in the event that in the expert opinion [of] the certifying scientist it might be present then we would go back to the original specimen." He continued, "It would be suggestive that there might be a low level present." However, he also agreed that nandrolone might not be present. He agreed that according to the data in RX B, he would report the results of anabolic steroids or any of the metabolites as negative.

He said that the results of Respondent's own drug test, administered three weeks after the random drug test, "did not meet the criteria for going forward for confirmation and quantification but it is reported as negative."

Sample opined that the fact that the March 30, 2011 sample tested positive for nandrolone at a concentration of 6.8 nanograms per milliliter and that another sample, collected three weeks later, came back negative would not necessarily mean that there could have been only a single ingestion of nandrolone. It could mean that Respondent was at the end of his elimination phase. Sample agreed that based on his review of the data and all the tests that were conducted he cannot definitively say how much steroid was ingested but said it might have been one injection.

During redirect examination, Sample agreed that based on the review of RX A, there is nothing that reflects that Respondent was observed urinating into a beaker [at his own urine specimen collection on April 20, 2011]. Sample said that Quest encourages employers to have an observed urine collection but it does not provide staff to conduct the observation. Quest would either call a third party to observe, or the employer may provide an observer. He said that if Respondent had brought an observer with him, then this information would have been reflected in RX B, but the package does not indicate that. He was not aware of any documented studies that suggested that a single use of nandrolone would result in the detection of nandrolone metabolites in the urine for anything more than "a couple of months."

During re-cross examination, Sample reiterated that looking at different results of the different specimens together would suggest that the individual was likely near the end of the elimination phase.

During further redirect examination, Sample testified that the concentration of 19-norandrosterone at 6.8 nanograms per milliliter does not say anything about usage amounts or when Respondent used it but that "if you are measuring the concentration in urine that concentration is somewhat dependent upon the concentration, that is the hydration state of the individual, somebody normally drinks a lot of fluid their urine is going to be more dilute concentration would be lower." He continued that "likewise if they don't ordinarily drink a lot of fluid urine will be more concentrated and concentration would be higher." He said that in Respondent's case, the testing was done for the validity for the Department specimen and the creatinine, which indicates the dilution of the urine, was relatively normal, so, "a level of 6.8 in that case would suggest

a relatively low amount and that the individual maybe closer to the end of their elimination phase." For the test Respondent took on his own, Quest did not test for creatinine levels for dilution. Sample agreed that Respondent could have gotten the same test for dilution included in the steroid test.

During re-cross examination, Sample said he would not expect the creatinine to be affected by the dosing regimen for steroids.

During redirect examination, Sample agreed that because Respondent's private test did not test for creatinine levels, Sample did not know if water was used to dilute the donor's urine beforehand.

On recall, Sample testified that it is possible for someone to be "cycling" with nandrolone or other anabolic agents and not necessarily show visible side effects. Sample agreed that based on scientific evidence and studies, a single injection of nandrolone would not be detectable five and a half months after the injection.

On further cross-examination, Sample agreed that he could not say exactly how long an oil-based nandrolone injection would remain in a person's body. He said that it is possible that different experts would have different opinions.

Respondent's Case

Respondent testified in his own behalf.

Respondent

Respondent, a six-year MOS, was assigned to Police Service Area 7 during 2011. Prior to being employed by the Department, Respondent was a member of the U.S. Army

for eight years. He testified that he knows Person A because they grew up together in the same neighborhood; they were childhood friends. He said that he and Person A first started working out at the gym in the summer of 2010. Respondent would work out with Person A when ever he had a day off, once or twice a week. He said that Person A was a personal trainer and that he did not pay him for training because they were friends.

He said that during his time in the military, he had a lot of issues with his back and received physical therapy on a few occasions. He testified that there was an instance where he could not workout with Person A because his back was “acting up, it was in pain that day.” He said for his back to flair up is a “common thing every year...where it hurts a lot...I have trouble sleeping or I can’t work out or I can’t run or do something or some kind of exercise.”

When Respondent told Person A about his injury, Person A said that he “uses something for his back... Person A plays football on the weekends all the time he has knee problems and wrist problems and whatever pain he has he uses something to numb his joints where it helps him to continue playing or able to come to work the next day...without the pain.” When Respondent asked Person A what it was, Person A said, “it’s something that I use for my pain.” Person A may have said that the name of the substance was “deca.” Respondent understood the substance to be a cortisone shot and that “deca” was the brand name of the cortisone. Respondent understood “deca” to be cortisone even though Person A did not say that it was cortisone.

Respondent received the injection from Person A around the “end of summer, mid fall, somewhere around there” in 2010. Person A injected Respondent once on his

shoulder. Respondent did not receive any other injections from Person A. He said that the injection did not have a positive or negative affect on him.

Respondent went to the Medical Division in March, 2011, for a random drug test where he submitted a urine sample. He followed the procedure of submitting his urine sample as described by Arayeas. A few weeks after the test, Respondent was informed by an IAB investigator that he had tested positive for a steroid and then he was suspended. Respondent then received information from his counsel's office that a laboratory report was provided to them which indicated that Respondent's sample tested positive for nandrolone.

Respondent then researched the company that conducted his test, Quest, and proceeded to get his own test done by submitting his own urine sample at a Quest laboratory branch office located in Manhattan. At the laboratory, Respondent "told them that I needed a test result on steroids specifically."

Respondent submitted his own urine sample on April 20, 2011. Prior to doing so, Respondent was searched and was wearing a T-shirt and shorts. No bottles were recovered from Respondent during the search. Respondent was instructed to "pee in a vial up to a certain amount and don't flush the toilet and don't wash my hands, the water wasn't working any way but they said just as soon as you go in just come right back out." Respondent said he was neither observed, nor asked to be observed, while he was urinating in the vial.

Respondent denied ingesting steroids knowingly. He said he had not been treated for liver, kidney or heart disease. He also denied being treated for gynecomastia, excessive acne, or having torn tendons. He denied having health problems other than the

back issues. He said he was 5 feet 9 inches tall and weighed 155 pounds, and in 2010 he weighed 150 or 155 pounds. He has never been placed on force monitoring, nor does he have a prior disciplinary history with the Department.

On cross-examination, Respondent agreed that he is aware of the Department's policy regarding steroid use and that he was aware of this policy before Person A injected him. Respondent acknowledged that creatinine is one of the supplements that he took. In his official Department interview, Respondent had said that he received the injection because he had hurt his back. However, Respondent clarified that he did not hurt his back the day he received the injection. Rather, he had hurt his back in the past and his back was "acting up" on the day that he received the injection. Respondent did not report sick as a result of his back "acting up."

Respondent said that he received the injection "towards the end of summer" or around August, 2010. Respondent denied ever knowingly taking a steroid injection. Respondent said he refused to take the injection approximately two times because the substance that Person A was giving him was only "injectable" and Respondent did not like needles. Respondent maintained that he believed the entire time that the injection was a cortisone shot and not something illegal. He said had he known that Person A used steroids he would have been more apprehensive. He did not ask Person A if it was a steroid because, "I wouldn't think that he would use it. I don't know anybody who actually uses the stuff so...that wouldn't be a question that would come to my mind."

He acknowledged that even though he was suspended on April 14, 2011, because of the positive result on his random test, he did not take his personal drug test until April 20, 2011. Respondent explained that between April 14 and April 20, he was looking for

other testing sites by "Googling and making phone calls for...drug tests for other things marijuana, controlled substances, maybe they could lead me somewhere for testing." He continued "you can't find testing areas nowhere, you know, remotely close to where I live."

Respondent contacted Quest but he did so on a weekend and was told that he could not take the test on a weekend and that the next available day to be tested was the upcoming Tuesday. He said he did not consume more than the usual amount of water on the days preceding his personal drug test.

Respondent said that it was after Weck asked him if anyone had ever injected him with something that he "started to think about it and you know, immediately you know, I got kind of afraid maybe that time it was some kind of steroid...I still didn't know at the time it's not until I found out what was in the injection until I spoke to Person A that is the only time I found out that that had any kind of illegal affect." He said that "when I am taking the test I am not thinking you know, do this or do that for the test, I know I'm negative, I know I am completely clean there is no way I can have any kind of steroids in my system."

Respondent did not consult with anyone regarding the type of test that should be conducted on the urine sample he submitted on April 20, 2011. Respondent asked Quest to test for steroids, specifically nandrolone.

FINDINGS AND ANALYSIS

It is charged that between March 30, 2010 and March 30, 2011, Respondent engaged in conduct prejudicial to the order, efficiency or discipline of the Department in

that he wrongfully possessed and ingested the steroid nandrolone without police necessity or authority to do so.

The testimony of Arayeas established that Respondent's urine samples were properly collected, packaged, sealed and transported to Quest for testing. The testimony of Dr. Sample established that Respondent's urine samples were received by Quest with their seals intact and were properly tested by Quest. Respondent did not challenge the accuracy of the results produced by the screening test that is utilized by Quest to initially analyze samples for the presence of controlled substances, or the GC/MS instrumentation that is utilized by Quest to confirm the presence of controlled substances in samples which have tested positive during the screening test and to quantify the concentration levels in the samples of the controlled substance(s) detected.

Sample was stipulated to be an expert in the field of testing urine and hair for drug content. Sample explained and interpreted the data contained in the laboratory data packages produced by Quest which detail the analytical results of the testing of Respondent's samples (DX 7 and DX 8). Although Sample did not personally conduct any of these tests, due process does not require that the technicians who performed these tests testify at the disciplinary hearing. Testing results may be admitted and credited based on the testimony of Sample who, as the Director of Science and Technology at Quest, was responsible for all of the technical and administrative aspects of the laboratory, including the performance of laboratory certifying scientists.

Where, as here, the reliability of the testing procedure used has been established, where Sample was familiar with all the steps taken, and where Sample was subjected to cross-examination and no claim was raised that there was a specific defect in the testing

procedures, due process does not require that the technicians who actually performed tests on Respondent's samples testify at the disciplinary hearing.¹ Respondent does not allege any specific defect in the testing procedures utilized by Quest.

Sample testified that the testing data shows that after one of Respondent's samples tested positive via a scientifically recognized screening method, both of Respondent's samples were separately subjected to testing utilizing the scientifically recognized GC/MS method. He explained that the analytical results show that when Respondent's samples were individually tested via GC/MS instrumentation, the samples tested positive for nandrolone at a concentration level above the administrative cut-off level.

Where, as here, a recognized screening test positive result is confirmed when the same sample is subjected to GC/MS analysis, such testing results have been found to constitute substantial scientific evidence of the presence of the controlled substance that is detected.² Based on all of the above, the test results obtained by Quest regarding both of Respondent's samples constitute substantial evidence that Respondent ingested the steroid nandrolone between March 30, 2010 and March 30, 2011.³

Affirmative defense of unknowing ingestion

Respondent raised the affirmative defense of unknowing ingestion by contending that he was not aware that the substance Person A injected him with was a steroid.

¹ Gordon v. Brown, 84 N.Y.2d 574, 579-580 (1994).

² McBride v. Kelly, 215 A.D.2d 161 (1st Dept 1995).

³ See McGovern v. Safir, 266 A.D.2d 107 (1st Dept 1999).

Respondent testified that because he was suffering from back and shoulder pain, he allowed Person A a childhood friend and a trainer at the gym where Respondent worked out, to inject him with a substance. Respondent asserted at this trial that he assumed that Person A had injected him with a cortisone-type substance and that he had no reason to believe that Person A would inject him with a controlled substance such as a steroid.

I reject this affirmative defense. As a uniformed member of the Department, Respondent was under a duty to ascertain whether any substance he received from another person constituted a controlled substance. Respondent was also under a duty to insure that any substance he received from another person was obtained lawfully through a legitimate, authorized provider. Respondent knew that Person A had no medical or pharmaceutical license and, thus, was not authorized to dispense any controlled substance. Also, since Respondent testified that Person A administered the injection between August and October of 2010, Respondent's ingestion of nandrolone post-dated the issuance of Personnel Bureau Memo 95, "Anabolic Steroids and Human Growth Hormone," which was issued on December 21, 2009 and which directs members of the service to take steps to insure that they do not "abuse" any substances which are "anabolic steroids/HGH or steroid/hormone precursors," such as nandrolone.

Moreover, Respondent admitted that Person A may have told him that the substance he was injecting him with was "deca." Yet Respondent admitted that he made no attempt to find out what "deca" was or whether it was a controlled substance. A claim of unknowing ingestion is undone where the record establishes that Respondent displayed a determined and purposeful ignorance⁴ regarding the substance he ingested.

⁴ See Disciplinary Case No. 83969/08, signed February 18, 2011.

As a result, I find that the Respondent did not meet his burden of persuasion regarding this affirmative defense.⁵

Respondent is found Guilty.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974). Respondent was appointed to the Department on July 10, 2006. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

Respondent has been found guilty of wrongfully possessing and ingesting the steroid nandrolone without police necessity or authority to do so.

The Assistant Department Advocate (the Advocate) recommended that Respondent be immediately Dismissed from the Department.

In his closing argument at this trial, the Advocate argued that Respondent's employment with the Department should be terminated "because steroids, specifically nandrolone, are illegal, just like marijuana, just like cocaine, and just like heroin...it is not different." (Transcript page 198) The Advocate further argued that "even one use" of nandrolone by a member of the service "is grounds for termination." (Transcript pages 198-199) The Advocate did cite any prior disciplinary decisions to support his penalty recommendation.

The Advocate's position that possession and ingestion of a steroid such as nandrolone is no different than possession and ingestion of illegal controlled substances

⁵ See Goldin v. Kelly, 77 A.D.3d 475 (1st Dept 2010); Green v. Sielaff, 198 A.D. 2d 113 (1st Dept 1993).

such as marijuana, cocaine and heroin is not supported by the laws regulating controlled substances in New York or by prior Departmental disciplinary decisions.

As the Advocate conceded during his closing argument, some steroids, such as nandrolone, can be lawfully obtained from a pharmacy via a prescription issued by a physician whereas marijuana, cocaine and heroin cannot be obtained via prescription within the State of New York.

As to the Advocate's position that the zero tolerance policy that the Department has implemented regarding possession and ingestion of illegal drugs (i.e. marijuana, cocaine and heroin) is also applicable to a steroid such as nandrolone, this position is not supported by Personnel Bureau Memo 95, "Anabolic Steroids and Human Growth Hormone," issued on December 21, 2009 (the memo). Although Paragraph 14 of the memo states that "any member of the service found to be abusing anabolic steroids/HGH or steroid/hormone precursors will be subject to disciplinary action," this memo does not establish a zero tolerance policy mandating that members who are found to be abusing anabolic steroids be dismissed from the service.

On the contrary, the Advocate's recommendation that Respondent be immediately dismissed from the Department is inconsistent with the penalties imposed in numerous prior disciplinary decisions where a member has been either pleaded guilty⁶ or been found guilty⁷ of ingesting a steroid outside the normal course of standard medical care.

The facts here are very similar to the facts in Disciplinary Case No. 83159/07, signed on December 16, 2009, where a police officer with no prior disciplinary record

⁶ See, most recently, Case No. 84310/08, signed July 14, 2010; Case No. 86010/09, signed September 28, 2010; Case No. 2009-276, signed April 12, 2011; and Case No. 2088-337, signed October 12, 2011. See also the decisions cited in Case No. 83159/07 signed on December 16, 2009.

⁷ See Case No. 83969/08, signed on February 18, 2011.

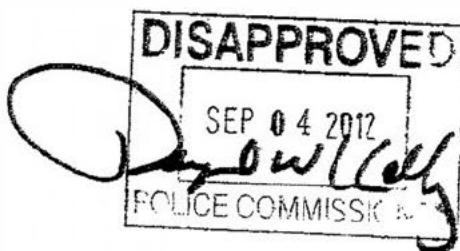
forfeited 60 suspension days already served and was placed on dismissal probation for possessing and ingesting nandrolone. In that case, as here, the Advocate argued that the penalty should be termination from employment. Also in that case, as here, the officer testified that he was suffering from a physical ailment and that he sought relief by ingesting nandrolone which he had not obtained via a prescription issued by a physician. I see little difference between the fact that in that case the officer obtained the nandrolone he ingested by purchasing it from a web site on the Internet and the fact that here Respondent was injected with nandrolone obtained by his personal trainer. Although the police officer in that case pleaded guilty, Respondent here should not be subjected to the penalty of immediate dismissal from the Department merely because he requested a trial.

Having examined the facts and circumstances surrounding the Respondent's misconduct, and consistent with the penalties imposed in prior disciplinary decisions, I recommend that Respondent be DISMISSED from the New York City Police Department, but that his dismissal be held in abeyance for a period of one year, pursuant to Section 14-115 (d) of the Administrative Code of the City of New York, during which time he is to remain on the force at the Police Commissioner's discretion and may be terminated at any time without further proceedings.

It is further recommended that Respondent forfeit the 32 days he has already served on pre-trial suspension without pay and that he be suspended for an additional 28 days for a total forfeiture of 60 suspension days.

Respectfully submitted,


Robert W. Vinal
Assistant Deputy Commissioner Trials

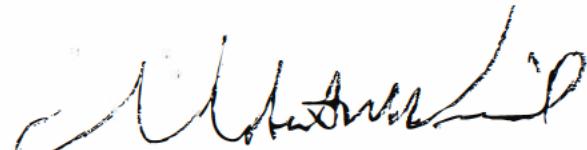


POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner - Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER CLINT OLIVO
TAX REGISTRY NO. 942291
DISCIPLINARY CASE NO. 2011-4578

The Respondent received an overall rating of 4.0 on his 2010 performance evaluation, 3.5 on his 2009 evaluation, and 3.5 on his 2008 evaluation. He has no medals. [REDACTED] He has no prior formal disciplinary record and no monitoring records.

For your consideration.



Robert W. Vinal
Assistant Deputy Commissioner – Trials